BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
1998 Biennial Regulatory Review — Spectrum Aggregation Limits for Wireless Telecommunications Carriers	)))	**WT Docket No. 98-205**

COMMENTS OF SOUTHERN COMMUNICATIONS SERVICES, INC

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COMMENTS
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SOUTHERN COMMUNICATIONS SERVICES, INC

Southern Communications Services, Inc. ("Southern Communications,")[1] by and through counsel, and pursuant to Section 1.415(b) of the Federal Communications Commission's rules, 47 C.F.R. § 1.415(b), hereby submits comments in response to the FCC's Notice of Proposed Rulemaking[2] ("NPRM") in the above-captioned matter, regarding the Federal Communications Commission's (the "Commission's") comprehensive review of spectrum aggregation limitations established in the CMRS Third Report and Order, 9 FCC Rcd 7899 (1994). For the reasons stated below, Southern Communications believes the Commission should adopt a 15 MHz spectrum cap for auctioned and other commercially used 800 MHz spectrum.

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1 Southern Communications provides service today through most of the State of Alabama, almost all of the State of Georgia, the Panhandle area of Florida, and the southeastern third of the State of Mississippi. With over 400 digital base station sites in service and integrated into its centralized Dispatch Application Processor and centralized switching interconnected to the public switched telephone network, Southern Communications provides the most comprehensive geographic coverage of any mobile wireless service in Alabama and Georgia and serves areas of Florida and Mississippi that are not served by others. Accordingly, its service is used by statewide public safety and emergency management agencies, by local governments in rural areas, by public utilities operating in rural and urban areas, as well as by commercial and other government customers in urban and rural areas. It competes vigorously with Nextel in areas where Nextel operates.

Southern strongly supports the Commission's guiding principle that "trusting in the operation of market forces generally better serves the public interest than regulation."[3] Similarly, Southern agrees that *narrowly tailored* regulation may be required to permit competition when there is "identifiable market failure."[4] Southern believes that the FCC's own analysis, since the establishment of the CMRS spectrum cap, demonstrates exactly such a market failure in the SMR service.[5] Southern reluctantly concludes that the current spectrum aggregation limit is inadequate to protect competition in the SMR service and should be replaced by a narrowly tailored, service-specific limitation that would address the market power problem in the SMR service identified in *Pittencrieff*. In that proceeding the Commission examined a merger that resulted in an aggregation of 800 MHz spectrum typical of Nextel Communications, Inc. ("Nextel") holdings nationwide and found that it would result in anti-competitive effects in the dispatch service product market. The Commission expressly found that its earlier evaluations of Nextel's spectrum acquisitions had not considered competition in the relevant markets, but had merely assumed that CMRS service regulatory classification defined the relevant market. The Commission had not examined the products and services consumers use and consider interchangeable, nor had it assessed the risk that market power would be exercised in any relevant market. Southern Communications' experience reaffirms the assessment of the market made in *Pittencrieff*: dispatch service constitutes a distinct market and Nextel is achieving market power in that market. Despite the anti-competitive effects of the *Pittencrieff* merger, the

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2 FCC 98-308, Dec. 10, 1998.

3 NPRM ¶ 5.

4 *Id.*

5 *In Re Applications of Pittencrieff Communications, Inc. and Nextel Communications, Inc.*, 13 FCC Rcd 8935 (1997) (*"Pittencrieff."*)

Commission approved the merger, believing the greater public interest lay in speeding Nextel's competition with local cellular telephone carriers. The present rulemaking presents the Commission with the opportunity to mitigate the acknowledged anti-competitive effects, identified in *Pittencrieff*, of the aggregation of 800 MHz channels in the dispatch service product market.

Southern Communications proposes that the Commission adopt a Presumptive SMR Spectrum Cap of 15 MHz of 800 MHz frequencies that are subject to auction or authorized for commercial use in any Economic Area,[6] or such amount as the Commission finds appropriate upon its investigation into this issue (the "Presumptive Cap").[7] 15 MHz represents almost 70% of the 800 MHz spectrum auctioned or scheduled for auction.[8] By ensuring that no single party could amass more than 70% of this spectrum, the Commission would ensure that the distinct SMR market could benefit from competition. Southern notes that this Presumptive Cap would be less restrictive on a percentage basis than the current spectrum cap in other services, *e.g.*, PCS. The Presumptive Cap could be exceeded by showing agreements to divest channels exceeding the Presumptive Cap to other carriers or users (such as relocating other independent persons). At a minimum, the Commission should condition participation in future auctions upon acceptance by participants of the Presumptive Cap.

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6 The population center or centers of an Economic Area used by the Commission for licensing represents the most likely location of a bottleneck caused by excessive spectrum aggregation. Dispatch service is regional in nature and the Economic Areas used by the Commission represent a reasonable approximation of geographic markets.

7 The Commission should consider that requests for additional spectrum may be designed to limit the possibility of competition.

Southern Communications provides mobile digital dispatch, duplex telephony, short messaging, and data service through a single handset. Southern Communications uses the same iDEN technology and equipment that Nextel uses. Motorola's iDEN technology is the only digital dispatch technology commercially available. Capacity limitations prevent older analog systems from providing meaningful competition. There is a steady demand for the one-to-many communication provided by dispatch service, both among traditional users of the service, such as public safety, construction, forestry, and public utility crews, and also among repair services, distributors, contractors and other commercial concerns as envisioned by the Commission when it established the SMR service. Whether private or commercial, analog dispatch quickly fails to provide the needed capacity; digital service uses channels more efficiently and better meets demand for group communications. Digital dispatch can only be provided at a reasonable cost if it is provided with other services, such as short messaging, telephony, and data services. When the power utility affiliates of Southern evaluated their needs for dispatch service, they determined in 1993 that the Motorola MIRS (now iDEN) technology could best meet their requirements. Only one other option existed at that time. After initially deploying the iDEN system in 1994, Southern reevaluated iDEN during 1995. Southern found that Motorola's only potential competitor had not developed a competing product in the interim and that iDEN represented the only available means of providing digital dispatch on an economical basis, that is, integrated with other services.

The technological and commercial barriers to entry are substantial, as demonstrated by the recent failure of Geotek Communications, Inc. Motorola reports that it has developed an

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[8] If all Business and I/LT spectrum were authorized for commercial use, the Presumptive Cap would represent approximately 57% of available spectrum. If all 800 MHz were considered, the Presumptive Cap would constitute 50% of the spectrum.

iDEN product for the 900 MHz spectrum band, but it has not commercially deployed its 900 MHz technology. Nextel, which is still 20% owned by Motorola, has substantial 900 MHz frequency holdings. It is therefore unlikely that 900 MHz iDEN technology will be deployed in a fashion that competes with Nextel. Cellular and PCS telephone systems also face barriers to entry to the dispatch market because their entire systems (and millions of handsets in the hands of consumers) are designed to use their entire spectrum for cellular telephone service. Consequently, those carriers would have enormous transition costs to overcome before they could meaningfully compete with Nextel for dispatch service customers.

The Commission is obliged to assess the effect of its policies upon competitive conditions within the relevant markets. *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Nextel has achieved a dominant position in the 800 MHz channels throughout the United States, a fact which makes the Commission's concerns expressed in *Pittencrieff* applicable throughout the United States. Nextel won more than 96% of the spectrum available through auction. 12 FCC Rcd 20417, 20424-49 (December 17, 1997). Nextel's domination of the auction was a foregone conclusion because the spectrum was overwhelmingly encumbered by Nextel's pre-auction license holdings, making it generally impossible to offer competing bids due to the absence of any spectrum to which Nextel could be relocated.

Nextel's conduct in the marketplace has been consistent with the market power found in *Pittencrieff*. Nextel generally offers digital dispatch service at well over $ 60 per month in regions where it faces no competition. Despite the congestion on its Atlanta system, Nextel generally offers dispatch service at $34 per month, and even provides select Atlanta dispatch subscribers unlimited dispatch service at $25 per month and deep equipment discounts. Leading monopoly case law establishes that the ability to engage in significant price discrimination is a significant and even determinative proof of the existence and exercise of market power. *United States v. United Shoe Mach. Corp., 110 F. Supp. 295* (D. Mass. 1953) *aff'd per curiam,* 347 U.S. 521 (1954); *United States v. Aluminum Co. of America,* 148 F.2d 416, 438 (2d Cir. 1945). Nextel's market conduct confirms the national applicability of the Commission's findings in *Pittencrieff.*

Thus, the concerns expressed in *Pittencrieff* are well founded, as is the market analysis adopted by the Commission in that opinion. The Commission must address this problem of dispatch service market power by revising the spectrum cap. The current cap does not effectively limit market power in this important market. Eliminating the cap may benefit competition in other segments, but will not provide needed competition in the dispatch service market. Replacing the current cap with an SMR specific cap, such as the Presumptive Cap Southern Communications proposes, either as a general requirement or, failing that, as a condition to future auction participation, is necessary if effective dispatch competition is to be preserved.

Respectfully submitted,

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Dated: January 25, 1999

CERTIFICATE OF SERVICE

I, Sandy Baldwin, a secretary at McDermott, Will & Emery, do hereby certify that on this 25th day of January 1999, a copy of the foregoing "Comments Of Southern Communications Services, Inc." was hand-delivered to each of the following:

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